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the dispensary, but the commissioners refused to acknowledge them and suit was instituted thereon in the Federal Court. *Held*, that such commissioners were not officers of the state performing for it any functions of government and that this suit was not a suit against the state under the 11th Amendment. *Murray et al. v. Wilson Distilling Co.* (1908), — C. C. A., 4th Cir. —, 164 Fed. 1.

It is well settled that under the 11th Amendment no action can be maintained in any federal court by a citizen of one state against a state without its consent. *Cunningham v. Macon, etc., R. R.*, 109 U. S. 446; *Hans v. Louisiana*, 134 U. S. 1; *Pennoyer v. McConnaughy*, 140 U. S. 1. The decision of MARSHALL, J., in *Osborn v. Bank*, 9 Wheat. 738, holding that where jurisdiction depends on the party it is the party named in the record, is qualified by later decisions of the United States Supreme Court which hold that whether or not it comes within the prohibition of the 11th Amendment is not always determined by reference to the nominal parties in the record, as the court will look behind the nominal parties on the record to ascertain who are the real parties to the suit. *In re Ayers*, 123 U. S. 443; *Cunningham v. Macon, etc., R. R.*, 109 U. S. 446; *New Hampshire v. Louisiana and New York v. Louisiana*, 108 U. S. 76; *Poindexter v. Greenhow*, 114 U. S. 270. Suits are forbidden when the suit is against the officers of the state as representing the state's action and liability, thus making it, though not a party to the record, the real party against whom the judgment will operate. *Louisiana v. Jumel*, 107 U. S. 711; *Hagood v. Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443. When, however, the suit is brought against the defendants, who claim to act as officers of the state and commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state, such suit is allowable. *Osborn v. Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *Poindexter v. Greenhow*, 114 U. S. 270; *Ex parte Young*, 209 U. S. 123. The 11th Amendment gives no immunity to officers or agents of a state in withholding the property of a citizen without authority of law, and the mere fact that defendants assert a right of possession in the state through its officers and agents is not enough. *Tindal v. Wesley*, 167 U. S. 204; *United States v. Lee*, 106 U. S. 196. The legislature in creating the commission did not confer upon them any powers in connection with the administration of the state's affairs, but simply made them holders or trustees of a special fund, intrusted to them for the payment of state debts. The legislature may create such a trust, *PERRY, TRUSTS*, § 30; *Commissioners of Sinking Fund v. Walker et al.*, 6 How. (Miss.) 143, and suit to enforce payment out of such fund is not a suit against the state.

CONTRACTS—AGREEMENT IN RESTRAINT OF TRADE IF SEVERABLE AND REASONABLE AS TO PART IS VALID.—Defendant, who was manager and owner of the controlling interest in a corporation having its principal place of business in Jersey City, sold his interest to the other members of the corporation and agreed not "to directly or indirectly engage in, promote or give name to any business of the same kind or character within five hundred

miles from Jersey City within twenty years from date." Within five months he became interested in a competing business located in the same city. *Held* (PITNEY, Ch., SWAYZE, VOORHEES and GREEN, JJ., dissenting), that such contract should be construed to restrain defendant either within Jersey City or within five hundred miles therefrom, and as so read was severable and sustainable in so far as it applied to the city, even if unenforceable as to outside territory. *Fleckenstein Bros. Co. v. Fleckenstein* (1908), — N. J. L. —, 71 Atl. 265.

In the interpretation of a contract the court should place itself as near as may be in the situation of the contracting parties when the agreement was made and endeavor to ascertain the actual intent of the parties. *Uinta Tunnel Min. & Transp. Co. v. Ajax Mining Co.*, 141 Fed. 563. A party's promise is to be construed, if consistent with its terms, in the sense he must have believed that the party to whom it was made understood it. *Metropolitan Bank v. Northern Fuel Co.*, 73 Ill. App. 164, affirmed 173 Ill. 345. No precise or invariable rule can be laid down by which it may be determined whether the contract is entire or severable, for it is a question of construction as to the intention of the parties, to be discovered in each case from the language employed and the subject matter of the contract. *Atlantic & D. Ry. v. Del. Const. Co.*, 98 Va. 503. An agreement incidental to the sale of property as a business, that the seller will not enter into a competing business, is valid and enforceable notwithstanding it is in partial restraint of trade. *McConnell v. Camors-McConnell*, 140 Fed. 412. Accord *Davis v. A. Booth & Co.*, 131 Fed. 31; *Fisheries Co. v. Lennon*, 130 Fed. 533. Parties may make a valid agreement in restraint of trade where the operation of the agreement is partial and limited under reasonable conditions and where it is supported by a valid consideration. *Swigert & Havard v. Tilden*, 121 Ia. 650, 97 N. W. 82; *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507; *A. Booth & Co. v. Seibold*, 74 N. Y. S. 776. The trend of opinion is that such a contract is not injurious to the public interests so long as the area within which the business is restrained is no greater than is covered by the business whose good will has been sold. PAGE, CONTRACTS, vol. I, § 378. Restraint as to Jersey City was clearly necessary for the protection of the business as it existed at the time of the sale, and to that extent is not in opposition to public policy and may be enforced. *Trenton Potteries Co. v. Oliphant*, *supra*.

CORPORATIONS—TAXATION—FRANCHISE TAX.—Appellee company, a corporation, whose principal business is the manufacture and sale of oil from cotton seed, owns and operates two hundred or more tank cars for transporting its oil to market and to its customers. It uses all of its cars in its own business. The method is to hire the cars to the transporting railroad at so much per mile, and then pay the carrier the regular transportation charges. § 4077, Ky. St. 1903, provides for the payment of a franchise tax to the state and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised, in addition to other taxes imposed by law, by twenty classes of companies enumerated therein.